

Gleason, Patricia

From: McGuigan, David
Sent: Wednesday, May 18, 2016 4:48 PM
To: Gleason, Patricia
Subject: Fwd: MS4 Trading

Categories: Red Category

Sorry Pat I seem to forgotten you

Sent from my iPhone

Begin forwarded message:

From: "McGuigan, David" <McGuigan.David@epa.gov>
Date: May 18, 2016 at 4:47:55 PM EDT
To: Lynn Buhl -MDE- <lynn.buhl@maryland.gov>, Virginia Kearney -MDE- <virginia.kearney@maryland.gov>, Brian Clevenger -MDE- <brian.clevenger@maryland.gov>, Raymond Bahr <rbahr@mde.state.md.us>
Cc: "Capacasa, Jon" <Capacasa.jon@epa.gov>, "Gable, Kelly" <Gable.Kelly@epa.gov>, "Trulear, Brian" <Trulear.Brian@epa.gov>, "Ottinger, Elizabeth" <Ottinger.Elizabeth@epa.gov>, "Dinsmore, Andrew" <Dinsmore.Andrew@epa.gov>, "Zolandz, Mark" <Zolandz.Mark@epa.gov>, "Edward, James" <edward.james@epa.gov>
Subject: MS4 Trading

My Maryland Colleagues,

Thank you for continuing the dialogue between staff at the Maryland Department of the Environment (MDE) and the U.S. Environmental Protection Agency (EPA) permitting staff on the use of trading to fulfill restoration requirements contained in issued Municipal Separate Storm Sewer System (MS4) permits in Maryland. EPA supports the development of trading programs as a means to achieve water quality goals, however, for these programs to satisfy NPDES compliance requirements, they must align with NPDES statutory and regulatory requirements.

MDE is seeking to use trading to meet the twenty percent restoration requirement contained in Part IV.E (Restoration Plans and Total Maximum Daily Loads) of the permits. MDE would like to do this without either reopening the permits or the restoration plans. We have consulted with EPA Headquarters staff from the Office of General Counsel and the Office of Water to get a national perspective on your trading proposal and the arguments you offered to support the proposal. There are two questions at hand, the first is whether the inclusion of trading would require a permit modification and the second, if it is a modification whether it would be a major modification.

In examining the first question it is helpful to look at the permit requirement that MDE believes trading can be used to satisfy. Part IV.E.2.a requires "... By the end of this permit term, [XXXX] County shall commence and complete the implementation of restoration efforts for twenty percent of the County's impervious surface area consistent with the methodology described in the MDE document cited in PART IV.E.2.a. that has not already been restored to the

MEP.” Permit PART IV.E.2.b requires that these restoration efforts be identified in restoration plans. Furthermore, it is clearly stated in PART IV.E that “restoration plans shall include a thorough water quality analysis, identification of water quality improvement opportunities, and a schedule for BMP and programmatic implementation to meet stormwater WLAs included in EPA approved TMDLs.” None of the reissued Phase I permits nor their supporting documentation discuss allowing trading to be used to satisfy the twenty percent restoration requirement nor the use of trading to meet WLAs. MDE acknowledges this, but maintains that while there is no explicit reference to the use of trading in MS4 permits, the 2014 **Accounting for Stormwater Wasteload Allocations and Impervious Acres Treated Guidance** is sufficiently flexible to allow trading to be considered as an alternate BMP. Upon review of the criteria for alternate BMPs (pgs 22-23 of the Guidance) and their certification procedures “**Certification of Innovative Stormwater Management Technologies for Retrofit Applications**”, it is clear that these innovative future BMPs are for “new and innovative technologies” and not relevant to a trading program.

Based upon EPA’s review of the permit, the permit fact sheet, supporting communication between MDE and EPA, and supporting policies and guidance (including the 2008 Maryland Policy for Nutrient Cap Management and Trading in Maryland’s Chesapeake Bay Watershed) available during that period, EPA can find no evidence that MDE considered trading to meet MS4 permit compliance obligations when it issued the permits. Additionally, EPA does not believe there is sufficient flexibility in existing policy or guidance that would allow trading to be considered as an alternate BMP or an innovative technology. Given these findings, EPA concludes that to include trading in these permits would require a permit modification, and the question is that whether this would be a major or minor modification.

Under 40 C.F.R. 122.63, the Director may modify a permit to make the corrections or allowances for changes in the permitted activity that are explicitly listed in that section of the regulations, without following draft permit and public notice requirements (i.e., a minor modification). However, none of the activities listed in 40 C.F.R. 122.63 relate to the current situation. Under 40 C.F.R. 122.62(a), a permit modification is allowed when the Director has received new information that was not available at the time of permit issuance and would have justified the application of different permit conditions (i.e., a major modification). The inclusion of a trading program in these permits could be classified under this requirement. Therefore, EPA concludes that to allow the introduction of trading into these permits would constitute a major permit modification. Any modification would need to include an adequate public notice/public comment period. Furthermore, EPA finds that all previously submitted Restoration Plans would need to be revised and resubmitted to MDE for review and approval, as well as subject to an additional public review.

EPA is a firm supporter of trading and is willing to continue to work with MDE toward the development of a program that meets permitting requirements. As we have discussed, this could be through the use of compliance agreements which offer a more flexibility than through the permitting mechanism. Such agreements could serve as a bridging function until the development of Maryland Trading regulations and the issuance of permits that incorporate trading provisions. We are willing to work with MDE in the crafting of these model agreements that could serve as a template for future permitting requirements, including the Phase II MS4 permit.

If you should have any further questions, please do not hesitate to contact me at 215-814-2158.

David

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